

PROPOSED REGULATION ORDER

Repeal Article 6, Subchapter 1, Chapter 1, Division 3, consisting of sections 60040 through 60053, Title 17, California Code of Regulations and adopt Article 4, Subchapter 1, Chapter 1, Division 3, sections 60040.1 through 60040.49, Title 17, California Code of Regulations

~~Article 4. Adjudicatory Hearings~~

~~Subarticle 1. General Provisions~~

~~§ 60040. Applicability.~~

~~The provisions of this article shall apply to all adjudicatory hearings conducted for the purpose of reviewing any of the following decisions of the executive officer (1) vehicle or engine recalls pursuant to Health and Safety Code Section 43105; (2) intention to revoke or suspend a license as a vehicle emission test laboratory pursuant to Section 2048 of Title 13, California Code of Regulations; and (3) to other decisions of the executive officer where the person directly affected by the executive officer's action requests a hearing and where an adjudicatory hearing is required by law but neither the administrative adjudication procedures contained in Government Code Sections 11500, et seq. nor other hearing procedures are specified. The provisions of this article do not apply to review of decisions of the executive officer related to the programs or actions of air pollution control or air quality management districts.~~

~~Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207, Health and Safety Code.~~

~~§ 60041. Definitions.~~

~~(a) "Days" means calendar days.~~

~~(b) "Manufacturer working days" means the days when the headquarters of the manufacturer petitioner is open for business.~~

~~Note: Authority cited: Section 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207, Health and Safety Code.~~

~~§ 60042. Petition for Hearing.~~

~~(a) Within 20 days after receipt of a decision by the executive officer described in Section 60040, the person directly affected by the decision may file a petition requesting a hearing to review the decision. Notwithstanding the above, a petition for a hearing pursuant to Health and Safety Code Section 43105 may be filed within 30 manufacturer working days of receipt of the executive officer's decision.~~

~~(b) Petitions shall be filed with the board secretary at the offices of the state board in Sacramento and shall include the following information:~~

- ~~(1) the name and address of the petitioner;~~
- ~~(2) a copy of the executive officer decision for which review is requested;~~
- ~~(3) the date the decision was received by the petitioner;~~
- ~~(4) the action the state board is requested to take;~~
- ~~(5) a complete, verified statement of the facts and relevant evidence; and~~

~~(6) the grounds on which review is requested, including legal argument and authorities. The verification may be on information and belief. The chairperson of the state board shall review the petition and if he/she determines that a hearing is not required by law, the petitioner shall be notified of the decision and there shall be no hearing under this article. The board secretary shall send a copy of the petition to any person who was given written notice of the executive officer's decision.~~

~~Note: Authority cited: Section 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207, Health and Safety Code.~~

~~§ 60043. Effect of Filing a Petition.~~

~~A decision of the executive officer ordering a recall of vehicles or engines or intending to suspend or revoke the license of a vehicle emission test laboratory shall be stayed on timely receipt of a petition requesting a hearing until the state board has filed a decision with the board secretary. Other decisions of the executive of officer shall also be stayed until the state board has filed the decision with the board secretary unless the executive officer finds that the adverse effects of a stay on the public health, safety and welfare outweigh the harm to those persons directly affected by the lack of a stay.~~

~~Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207 Health and Safety Code.~~

~~§ 60044. Executive Officer Response to Petition.~~

~~Within 20 days after receipt of a petition by the board secretary, the executive officer shall file with the board secretary and serve upon the petitioner a response to the petition, except that the executive of officer shall file a response within 15 manufacturer working days to a petition regarding executive officer decisions pursuant to Health and Safety Code Section 43105. The response shall contain the reasons for and the facts in support of the decision of~~

~~the executive officer under review.~~

~~Note: Authority cited Sections 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207, Health and Safety Code.~~

~~§ 60045. Time for and Notice of Hearings.~~

~~(a) A hearing shall be initiated no later than 75 days after receipt of a petition for review except that the hearing shall be initiated no later than 45 manufacturer working days after receipt of a petition regarding executive officer decisions pursuant to Health and Safety Code Section 43105. The state board may delay the hearing upon a showing of good cause therefore by any party, provided that the petitioner's consent to the delay must be obtained if the executive officer's decision is not stayed.~~

~~(b) The state board shall mail written notice to the petitioner and to any persons who have requested notice at least 30 days before the scheduled date of hearing, indicating the time and location of the hearing, except that the notice shall be mailed 25 manufacturer working days prior to a hearing regarding an executive officer decision pursuant to Health and Safety Code Section 43105. The notice shall state that the parties may, but need not be, represented by counsel at the hearing. The notice of the hearing shall also be posted in the state board offices in Sacramento and El Monte.~~

~~Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207, Health and Safety Code.~~

~~§ 60046. Appointment of Hearing Officer and Presiding Officer.~~

~~(a) Hearings under this article may be held by the state board, by a committee of no fewer than two members of the state board, or by an administrative law judge from the Office of Administrative Hearings. In cases where the hearing is conducted by a committee of the state board or an administrative law judge, the committee or administrative law judge shall prepare a recommended decision for consideration by the state board.~~

~~(b) When the state board, or a committee of the state board, hears the case, the board or the committee may request that an administrative law judge be present at the hearing to assist in conducting the hearing, and to advise on the admission and exclusion of evidence, and on matters of law.~~

~~(c) Notwithstanding Section 60045, if the state board requests that an administrative law judge conduct the hearing or assist in the hearing, the hearing may be delayed if necessary to obtain the services of an administrative law judge. However, when the executive officer's decision is not stayed, no hearing may be delayed beyond 180 days from receipt of the petition without the consent of the petitioner.~~

~~(d) The chairperson of the state board may serve as the presiding officer or may designate another member of the state board or the administrative law judge to serve as the presiding officer for the hearing.~~

~~Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207, Health and Safety Code.~~

~~§ 60047. Interested Persons~~

~~Any person shall have the right to submit written evidence and shall also have the opportunity to present oral evidence, including witnesses and argument, subject to reasonable limitations imposed by the presiding officer. A person shall notify the state board secretary of his/her intent to participate in the hearing at least 20 days prior to the hearing or 15 manufacturer working days prior to the hearing on an executive officer decision pursuant to Health and Safety Code Section 43105.~~

~~Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207, Health and Safety Code.~~

~~§ 60048. Subpoenas.~~

~~The chairperson of the state board the presiding officer of the hearing, or the administrative law judge may on his or her own motion or at the request of any party in accordance with the provisions of Government Code Section 11510, issue subpoenas for witnesses and for the production of documents at or prior to the hearing. Subpoenas are not required for the production of state board documents which are directly related to the executive officer's decision or which are required to be disclosed under the California Public Records Act (Government Code Section 6250 et seq.). Subpoenas are also not required for attendance at the hearing of members of the state board staff.~~

~~Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 39514, 43105 and 44207, Health and Safety Code.~~

~~§ 60049. Witness List, Prehearing Statement, and Prehearing Conference.~~

~~(a) No later than 10 days before the scheduled date of the hearing, or 10 manufacturer working days before the scheduled date of a Health and Safety Code Section 43105 hearing, the petitioner, the executive officer, and any person who has indicated that he/she intends to participate in the hearing shall each submit to the board secretary and serve upon one another a witness list including the name and qualifications of each proposed witness and a brief summary of the testimony to be presented by each witness. All parties shall also send to the board secretary and serve upon one another a prehearing statement which sets forth their respective positions regarding all contested issues.~~

~~(b) On the presiding officer's own initiative or on the motion of the petitioner or executive officer, the presiding officer may conduct a prehearing conference. The presiding officer shall set the time and place for the prehearing conference and give reasonable written notice to all parties.~~

~~Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207, Health and Safety Code.~~

~~§ 60050. Oaths.~~

~~In hearings under this article, members of the state board, the presiding officer and any administrative law judge assigned to the hearing shall be authorized to administer oaths and affirmations.~~

~~Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207, Health and Safety Code.~~

~~§ 60051. Conduct of the Hearing.~~

~~The presiding officer shall govern the conduct of the hearing and shall make decisions on the admissibility of evidence. The following rules shall apply to any hearing held pursuant to the provisions of this article.~~

~~(a) The hearing need not be conducted according to the technical rules relating to civil procedure, evidence and witnesses which would apply in a court of law. Any relevant noncumulative evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Relevant noncumulative evidence and legal argument which does not raise significant new issues shall not be denied admission based solely upon the failure of the petitioner to state the evidence or legal argument in the petition for hearing.~~

~~(b) Oral testimony offered by any witness shall be under oath.~~

~~(c) The petitioner, the executive officer and interested persons shall each, subject to reasonable limitations imposed by presiding officer, have the right to call and examine witnesses, and to introduce exhibits. Parties may cross-examine opposing witnesses and offer rebuttal evidence if the presiding officer determines that cross-examination and rebuttal evidence is necessary to resolve disputed issues of material fact. The rules of privilege shall be effective to the extent that they are otherwise required by California statute to be recognized.~~

~~(d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions.~~

~~(e) Official notice may be taken of any generally accepted technical or scientific matter within the state board's field of competence or any matter which may be judicially noticed by the courts of this state. Parties present at the hearing shall be informed of and given an opportunity to rebut the matters proposed to be noticed.~~

~~(f) Evidence in the form of affidavits shall be admissible if offered in accordance with Government Code Section 11514.~~

~~Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207, Health and Safety Code.~~

~~§ 60052. Decision of the State Board.~~

~~After the hearing, or in the event the hearing is conducted by a committee of the state board or by an administrative law judge, following consideration of the recommendation of the committee or the administrative law judge and the hearing record by the state board, the state board shall issue a written decision setting forth findings and conclusions regarding all issues necessary to the decision. The state board shall file the decision with the board secretary as a public record and shall serve the written decision by certified mail on the petitioner and all other parties. The state board shall specify in the decision a date on which the decision is effective.~~

~~Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207, Health and Safety Code.~~

~~§ 60053. Request for Reconsideration.~~

~~(a) Within 20 days after service of the state board's decision, or within 15 manufacturer working days after service of the state board's decision in a hearing pursuant to Health and Safety Code Section 43105, the petitioner or the executive officer may submit a request for reconsideration, which shall include (1) a detailed statement of the legal and factual grounds on which reconsideration is requested; (2) the specific findings and conclusions for which reconsideration is requested; and (3) if additional evidence is sought to be presented, a description of the additional evidence and an explanation of why in the exercise of reasonable diligence it could not have been presented at the hearing. The party requesting reconsideration shall serve the request by certified mail on parties who participated in the original hearing within one day after submitting the request to the state board.~~

~~(b) The request for reconsideration may include a request that the decision of the state board be stayed, pending further administrative proceedings pursuant to this article. If such a request is made, the chairperson of the state board shall decide whether or not to stay the decision pending the state board's review of the request for reconsideration. The Chairperson of the state board shall make his/her decision based on his/her evaluation of the merits of the~~

~~petition, consideration of possible hardship to the party and possible adverse public health impacts.~~

~~(c) Within 45 days after the receipt of a request for reconsideration, or for Health and Safety Code Section 43105 hearings within 30 manufacturer working days after receipt of a request for reconsideration, the state board shall decide whether to grant or deny the request. The state board may decide to reconsider its entire decision or any portion thereof. The state board shall serve written notice of its decision to grant or to deny reconsideration on the party requesting reconsideration and all participants in the prior hearing. If reconsideration is granted, the written notice shall describe any further proceedings.~~

~~(d) If reconsideration is granted, and if the party requesting reconsideration also requested a stay of the decision of the state board, the state board shall decide whether the stay shall be granted. If the request for reconsideration is denied, any stay of the decision pending state board review of the reconsideration request shall be dissolved.~~

~~Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 43105 and 44207, Health and Safety Code.~~

Article 4. Adjudicatory Hearings Administrative hearing Procedures for Considering Complaints and Petitions for Review of Executive Officer Decisions

Subarticle 1. General Provisions

§ 60040.1. Applicability

(a) This article governs hearings to review complaints issued by the state board pursuant to Health and Safety Code section 43028. The procedures outlined here do not apply to citations that are subject to review under Article 5, section 60075, et seq.

(b) The provisions of this article shall also apply to all adjudicatory hearings conducted for the purpose of reviewing any of the following decisions of the executive officer:

(1) vehicle or engine recalls pursuant to Health and Safety Code Section 43105;

(2) intention to revoke or suspend a license as a vehicle emission test laboratory pursuant to Section 2048 of Title 13, California Code of Regulations; and

(3) other decisions where the person directly affected by the executive officer's action requests a hearing and where an adjudicatory hearing is required by law but neither the administrative adjudication procedures contained in Government Code sections 11500, et seq. nor other hearing procedures are specified.

(c) The provisions of this article do not apply to review of decisions of the executive officer related to the programs or actions of air pollution control or air quality management districts, and final orders or decisions under this regulation and section 60075.46.

Note: Authority cited: Sections 39600 and 39601, 43028, Health and Safety Code.
Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Sections 60075, et seq., Title 17 and 2048, Title 13, California Code of Regulations; Sections 11500, et seq., Government Code.

§ 60040.2. Definitions.

(a) The definitions applicable to these rules include those set out in the Health and Safety Code (commencing with section 39010) and in Title 13, California Code of Regulations, Chapter 5, Standards for Motor Vehicle Fuels, sections 2250, et seq., and Chapter 8, Clean Fuels Program, sections 2300, et seq., and Title 17, California Code of Regulations, sections 60075, et seq.

(b) The following definitions also apply:

(1) “Administrative record” means all documents and records timely filed with the hearing office, pursuant to section 60040.4 and the time deadlines of these rules, including pleadings, petitions, and motions; all documents or records admitted into evidence or administratively noticed by the hearing officer; all recordings or written transcripts of hearings conducted; and all orders or decisions issued by the hearing officer, executive officer, or the state board regarding the complaint at issue or the petition requesting review of an executive officer decision; administrative record does not include any prohibited communications as defined in section 60040.13, and any settlement discussions or offers of settlement pursuant to section 60075.24.

(2) “Complainant” means the state board, acting through any of its employees that have been authorized by the state board or its executive officers, to issue a complaint under this article.

(3) “Complaint” means a document issued by the complainant that alleges a violation(s) of Part 5 of the Health and Safety Code (other than a Class I violation for which a citation may be issued under Article 5 of this chapter) or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards.

(4) “Consent Order” means an order entered by the hearing officer in accordance with the settlement agreement of the parties.

(5) “Days” means calendar days.

(6) “Default” means the failure of any party to take the steps necessary and required by these regulations to further the hearing towards resolution, resulting in a finding by the hearing officer of forfeiture of the cause of action against that party.

(7) “Discovery” refers to the process set forth in section 60040.29 allowing one party to request and obtain information relevant to the complaint proceedings. The scope of discovery is limited by the express terms of that section.

(8) “Ex Parte Communication” means an oral or written communication not on the public record for which reasonable prior notice to all parties should have been given.

(9) “Party” includes the complainant and respondent, or petitioner and state board.

(10) “Petition” means petition to review an executive officer decision.

(11) “Petitioner” means a person directly affected by a decision of the executive officer who requests a hearing pursuant to subarticle 5 to review that decision.

(12) “Proceeding” means any hearing, determination or other activity before the hearing officer involving the parties to a complaint or a petition for review.

(13) “Respondent” means any person against whom a complaint is filed under this article.

(14) “Response” means a document, responsive to the complaint and signed by the respondent, in which respondent admits or denies the allegations of the complaint or asserts affirmative defenses to the action.

(15) “Settlement Agreement” means a written agreement executed by either the complainant and respondent or the petitioner and the executive officer that respectively settles the allegations of violation set forth in the complaint or the issues giving rise to the petition for review. Settlement agreements of a complaint should include:

(A) Stipulations by the parties establishing subject matter jurisdiction;

(B) An admission by respondent that it has committed the violations as alleged in the complaint or a statement by respondent that it neither admits nor denies such violation(s); and

(C) Agreement as to the assessment of a stated civil penalty, with or without conditions.

(16) “State board” means the California Air Resources Board; state board, itself, means the board members of the state board, acting as a body, in their authority as the head of a state department.

NOTE: Authority cited: Sections 39600, 39601, 43028, 39010, et seq., Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39514, 43105, 43028, Part 5, (commencing with 39010) Health and Safety Code; Sections 2250, et seq., 2300, et seq., Title 13; Sections 60075.1, et seq., Article 5, Title 17, California Code of Regulations.

§ 60040.3. Representation by Counsel.

(a) All parties have the right to be represented at all stages of the proceedings by counsel. Following notification that a party is represented by counsel, all further communications regarding the proceedings shall be directed to that counsel.

(b) A representative of a party shall be deemed to control all matters respecting the interest of such party in the proceeding. Persons who appear as representatives shall not engage in unethical conduct or intentionally fail to observe the provisions of Title 13, California Code of Regulations, section 2180, et seq., the proper instructions or orders of the hearing officer, or

these rules.

(c) A representative may withdraw an appearance by filing a written notice of withdrawal with the hearing office and by serving a copy on all parties.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Sections 2180, et seq., Title 13, California Code of Regulations.

§ 60040.4. Time Limits; Computation of Time.

(a) All actions required pursuant to these rules shall be completed within the times specified in this article, unless extended by the hearing officer upon a showing of good cause, after consideration of prejudice to other parties. Requests for extensions of time for the filing of any pleading, letter, document, or other writing or completing any other required action must be received in advance of the date on which the filing or action is due and should contain sufficient facts to establish a reasonable basis for the relief requested.

(b) In computing the time within which a right may be exercised or an act is to be performed, the day of the event from which the designated period runs shall not be included and the last day shall be included. If the last day falls on a Saturday, Sunday, or a state holiday, time shall be extended to the next working day.

(c) In computing time, the term "day" means calendar day, unless otherwise provided.

(d) Unless otherwise indicated by proof of service, the mailing date shall be presumed to be the postmark date appearing on the envelope if first-class postage was prepaid and the envelope was properly addressed.

(e) Where service of any pleading, petition, letter, document, or other writing is by mail, overnight delivery, or facsimile transmission (fax), pursuant to section 60040.5(c), and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed shall be extended as provided in section 60040.5(c).

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§ 60040.5. Service, Notice and Posting.

(a) Except as otherwise provided, the original of every pleading, petition, letter, document, or other writing served in a proceeding under these rules shall be filed with the hearing office.

(b) The complaint and all accompanying information shall be served on the respondent personally or by registered mail.

(c) Except as provided in (b) above and unless otherwise required, service of any documents in the proceedings may be made by personal delivery; by United States first-class mail, by overnight delivery, or by fax.

(1) Service is complete at the time of personal delivery.

(2) In the case of first-class mail, the documents to be served must be deposited in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, properly addressed to the person on whom it is to be served at the office address as last given by that person on any document filed in the present cause of action and served on the party making service; otherwise at the party's place of residence. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 15 days if the place of address is outside the United States.

(3) If served by overnight delivery, the document must be deposited in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the office address as last given by the person on any document filed in the present cause of action and served on the party making service; otherwise at that party's place of residence. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.

(4) If served by fax, the document must be transmitted to a fax machine maintained by the person on whom it is served at the fax machine telephone number as last given by that person on any document which he or she has filed in the present cause of action and served on the party making the service. The service is complete at the time of the transmission, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.

(d) Each document filed shall be accompanied by a proof of service on each party or its representative of record on the date of service. The proof of service shall state whether such service was made personally, first-class mail, overnight delivery, or facsimile.

(1) Where service is made by personal delivery, the declaration shall show the date and place of delivery and the name of the person to whom the documents were handed. Where the person making the service is unable to obtain the name of her person to whom the documents were handed, the person making the service may substitute a physical description

for the name.

(2) Where service is made by first-class mail or overnight delivery, the declaration shall show the date and place of deposit in the mail, the name and address of the person served as shown on the mailing envelope and that the envelope was sealed and deposited in the mail with the postage fully prepaid.

(3) Where service is made by facsimile, the declaration shall show the method of service on each party, the date sent, and the facsimile number to which the document was sent.

(e) The proof of service declaration shall be signed by the person making it and contain the following statement above the signature: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at (City, State) on (Date)." The name of the declarant shall be typed and signed below this.

(f) Proof of service made in accordance with Code Civil Procedure section 1013a complies with this regulation.

(f) Service and notice to a party who has appeared through a representative shall be made upon such representative.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Sections 11182, 11184, Government Code.

§ 60040.6. Motions.

(a) Any motion or request for action by the hearing officer relating to any proceeding pending before him or her filed by any party, except those made orally on the record at the hearing, shall be in writing and shall be directed to the hearing officer, with written notice and proof of service to all parties. The caption of each motion shall contain the title and docket number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefore.

(b) Except as otherwise provided by statute or these regulations, or as ordered by the hearing officer, a motion shall be made and filed at least 15 days before the date set for the motion to be heard or the commencement of the hearing on the merits. Any response to the motion shall be filed and served no later than five days before the motion is scheduled to be heard or as ordered by the hearing officer.

(c) The hearing office shall set the time and place for the hearing of the motion. The

hearing shall occur as soon as practicable.

(d) Except as otherwise provided by statute or these regulations, the hearing officer may decide a motion filed pursuant to this section without oral argument. Any party may request oral argument at the time of the filing of the motion or the response. If the hearing officer orders oral argument the party requesting oral argument, or any party directed to do so by the hearing officer, shall serve written notice on all parties of the date, time and place of the oral argument. The hearing officer may direct that oral argument be made by telephone conference call or other electronic means. The hearing officer may order that the proceedings be recorded.

(e) The hearing officer shall issue a written order deciding any motion, unless the motion is made during the course of the hearing on the merits while on the record. The hearing officer may request that the prevailing party prepare a proposed order.

(f) A request for a settlement conference or a prehearing conference under sections 60040.27 and 60040.28 does not constitute a motion within the meaning of this section.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§ 60040.7. Form of Pleadings.

(a) Except as otherwise expressly provided in this article or by the hearing officer, there are no specific requirements as to the form of documents filed in a proceeding under these rules.

(b) The original of any pleading, letter, document, or other writing (other than an exhibit) shall be signed by the filing party or its representative. The signature constitutes a representation by the signer that it has read the document, that to the best of its knowledge, information and belief, the statements made therein are true, and that it has not filed the document for the purpose of delay.

(c) The initial document filed by any person shall indicate his or her status (as a party or representative of the party) and shall contain his or her name, address and telephone number. Any changes in this information shall be communicated promptly to the hearing office and all parties to the proceeding. A party who fails to furnish such information and any changes to it shall be deemed to have waived his or her right to notice and service under these rules.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§ 60040.8. Limitations on Written Legal Arguments or Statements

(a) Any written legal argument or statement submitted to the hearing officer by a participant in an action under this part shall be double spaced and typed in pica (twelve point) or larger type. Except as otherwise provided by this part, further limited by the hearing officer, or otherwise authorized by the hearing officer for good cause shown, no written legal argument, exclusive of any supporting documentation, may exceed:

(1) 12 pages, for arguments in support of or opposition to motions; and

(2) Three pages, for reply arguments.

Note: Authority cited: Sections 39600 and 39601, 43028, Health and Safety Code.

Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§ 60040.9. Records of the State Board.

(a) Except where public disclosure of information or exhibits is restricted by law, records of the state board are public records and are available to the public pursuant to section 91000, et seq., Title 17, California Code of Regulations.

(b) A party may request confidential treatment of a document or portion thereof on the basis that the information is confidential financial information, trade secrets, or other material exempt from disclosure pursuant to the California Public Records Act (Gov. Code §§ 6250, et seq.) and Title 17, California Code of Regulations, section 91011; or is otherwise exempt by law from disclosure.

(c) A party must submit its request for confidential treatment to the hearing officer in writing and must state the reasons justifying nondisclosure. Failure to make a timely request may result in a document being considered nonconfidential and subject to release.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Section 6250, et seq., Government Code; Section 91000, et seq., Title 17, California Code of Regulations.

§ 60040.10. Interpreters and Other Forms of Accommodation.

(a) In proceedings where a party, a party's representative, or a party's expected witness requires an interpreter for any language, including sign language, that party shall be responsible for notifying the hearing office as soon as the requirement is known, but no later than 10 days prior to the first day of hearing. The hearing officer may allow later notification for good cause. The hearing office shall be responsible for securing the interpreter, and for providing reasonable accommodation.

(d) The cost of interpreter services shall be paid by the state board if the hearing officer so directs. In determining who should pay the cost of the interpreter, the hearing officer shall base the decision on equitable considerations, including the ability of the party in need of the interpreter to pay the cost.

Note: Authority cited: Sections 39600 and 39601, 43028, Health and Safety Code.
Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Sections 11435.25, 11435.30, 11435.55, Government Code; Section 751, Evidence Code.

Subarticle 2. Hearing Officers

§ 60040.11. Authority of Hearing Officers.

In any matter subject to hearing pursuant to these rules, the hearing officer shall have the authority to do any act and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules, including, but not limited to, authority to hold prehearing conferences; conduct hearings to determine all issues of fact and law presented; to rule upon motions, requests and offers of proof, dispose of procedural requests, and issue all necessary orders; administer oaths and affirmations and take affidavits or declarations; to issue subpoenas and subpoenas duces tecum for the attendance of a person and production of testimony, books, documents, or other things; to compel the attendance of a person residing anywhere in the state; to rule on objections, privileges, defenses, and the receipt of relevant and material evidence; to call and examine a party or witness and introduce into the hearing record documentary or other evidence; to request a party at any time to state the respective position or supporting theory concerning any fact or issues in the proceeding; to certify official acts; to extend the submittal date of any proceeding; to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings, and decisions as may be necessary for the full adjudication of the matter.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Sections 11181-11182, and 11425.30, Government Code.

§ 60040.12. Disqualification.

(a) The hearing officer shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing.

(b) Any party may request the disqualification of a hearing officer by filing an affidavit or declaration under penalty of perjury. Such request must be made no later than 5 days prior to the commencement of a prehearing conference or first day of hearing on the merits,

whichever is earlier. The affidavit or declaration must state with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue shall be determined by the hearing officer.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Section 11425.40 Government Code.

Subarticle 3. Ex Parte Communications

§ 60040.13. Prohibited Communications

(a) Except as otherwise provided in this section, while the proceeding is pending, the hearing officer shall not participate in any communications with any party or representative of a party about the subject matter or merits of the case at issue, without notice and opportunity of all parties, to participate in communication except a party that has been determined to be in default pursuant to §60040.41.

(b) No pleading, letter, document, or other writing shall be filed in a proceeding under these rules by a party unless service of a copy thereof together with any exhibit or attachment is made on all other parties to a proceeding. Service shall be in a manner as prescribed in section 60040.5.

(c) For the purpose of this section, a proceeding is pending from the time of issuance of the complaint or issuance of an executive officer decision subject to this article.

(d) Communications prohibited under paragraph (a) do not include communications concerning matters of procedure or practice, including requests for continuances that are not in controversy. It also does not prohibit communications between a party and the hearing officer when the opposing party has had a default entered pursuant to § 60040.41.

(e) If necessary for the purpose of obtaining technical knowledge, assistance, and advice for the purpose of completeness of the record and furtherance of justice, the hearing officer may communicate with employees of the state board who have not served as investigators, prosecutors, or advocates in the matter at issue at either the proceeding or its preadjudicative stage. The hearing officer may utilize the assistance of an advisor to evaluate the evidence in the record. Such an advisor may not furnish, augment, diminish, or modify the evidence in any way.

§ 60040.14. Disclosure of Communication.

(a) If, while the proceeding is pending, but before serving as hearing officer, the hearing officer receives a communication of a type that would be in violation of this subarticle if

received while serving as hearing officer, he or she shall, promptly after starting to serve, disclose the content of the communication on the record and give all parties an opportunity to address it as provided below.

(b) If a hearing officer receives a communication in violation of this article, the hearing officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the hearing officer to the communication; and

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the hearing officer, and the identity of each person from whom the hearing officer received the communication.

(c) The hearing officer shall notify all parties that a communication described in this section has been made a part of the record.

(d) If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The hearing officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that hearing having been concluded.

(e) Receipt of ex parte communications may be cause for disqualification of the hearing officer.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Sections 11340.1 - 11340.5, Government Code.

§ 60040.15. Applicability to Executive Officer and State Board.

(a) The provision of subarticle 3 governing ex parte communications to the hearing officer also governs ex parte communications with members of the state board on matters that may come before them pursuant to subarticles 6 and 10, or the executive officer on matters that may come before him or her pursuant to subarticle 10.

(b) Except as provided in subarticle 10 while a proceeding is pending, the hearing officer shall have no communication with either the executive officer or the state board that is under reconsideration.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Sections 11430.70 - 11430.80 Government Code.

Subarticle 4. Issuance of and Response to Complaints

§ 60040.16. Violations Subject to a Complaint; Issuance.

(a) A complaint may be issued if:

(1) The violations alleged arise under Part 5 of the Health and Safety Code, or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards;

(2) The state board has determined that the alleged violations are not Class I violations that are subject to issuance of citations under Title 13, California Code of Regulations, Article 5, section 60075.1, et seq.; or

(3) The penalty for each violation does not exceed \$25,000 for any day of violation and the total penalty for all violation's alleged in a complaint does not exceed \$300,000.

(b) A complaint shall include:

(1) The names of each respondent alleged to have committed a violation(s) covered under this article;

(2) A statement of the facts, in ordinary and concise language, that specifically identifies the statutes and/or rules alleged to have been violated and the acts or omissions of the respondents that constitute the alleged violation(s). The statement shall be specific enough to afford the named respondents notice and information in which to prepare a defense;

(3) A proposed penalty that complainant seeks for the alleged violations committed;

(4) Reference to these procedures, and a statement that a copy of the procedures have been made available to respondent at the time of service of the complaint, and that Chapter 5 (commencing with section 11500) of the Government Code is not expressly applicable to these proceedings) ;

(5) Written notice to the respondent that, within 30 days from the date of service, it may respond to the allegations of the complaint and request a hearing. It shall also inform the respondent of the consequences of failing to respond by the applicable deadline; and

(6) Written notice to the respondent that it has under the hearing procedures the right to counsel; and, if necessary, the right to an interpreter.

(7) The address of the office issuing the complaint; the address to which payment of the proposed penalty may be sent; and the address of the hearing office to whom a request for a hearing shall be submitted.

Note: Authority cited: Sections 39600 and 39601, 43028, Health and Safety Code.

Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Part 5, Health and Safety Code; Sections 60075.1, et seq., Title 13, California Code of Regulations.

§ 60040.17. Withdrawal of or Amendment to the Complaint.

(a) The complainant may withdraw the administrative complaint without prejudice:

(1) Unilaterally and as a matter of right at any time before the deadline prescribed by section 60040.17 (a) or (b) of this article (whichever applies) for respondent to respond, or the date of the respondent's filing of a response in the action, whichever is sooner; or

(2) By stipulation with the respondent or by permission of the hearing officer at any time after the deadline prescribed by section 60040.17 (a) or (b) of this part (whichever applies), or the date of the respondent's filing of a response in the action, whichever is sooner.

(b) The complainant may amend the administrative complaint:

(1) Unilaterally and as of right at any time before the deadline prescribed by section 60040.17 (a) or (b) of this part (whichever applies), or the date of the respondent's filing of a response in the action, whichever is sooner; or

(2) By stipulation with the respondent or by permission of the hearing officer at any time after the deadline prescribed by section 60040.17 (a) or (b) of this part (whichever applies), or the date of the respondent's filing of a response in the action, whichever is sooner.

Note: Authority cited: Sections 39600 and 39601, 43028, Health and Safety Code.

Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§ 60040.18. Response to Complaint by Respondent.

(a) Within 15 days after service of the complaint, the respondent or counsel for the respondent may file a response to the complaint with the hearing office, in which the respondent may:

(1) Object to the complaint on the ground that it does not state acts or omissions upon

which the agency may proceed;

(2) Object to the form of the complaint on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a defense;

(3) Admit or deny the complaint, in whole or in part, specifying each allegation of fact or conclusion of law as to liability which is in dispute;

(4) Present new matters by way of affirmative defenses; or

(5) Oppose or agree to pay the penalty amount proposed in the complaint.

(b) The time period for response may be extended:

(1) By stipulation of the parties for 30 additional days to allow the parties to conduct informal settlement negotiations; or

(2) At the discretion of the hearing officer, for a period of up to 60 days, if the respondent can show good cause and if the complainant is not prejudiced by such a delay.

(c) Each uncontested allegation in the complaint shall be deemed admitted by the respondent.

(d) If the respondent fails to respond to the complaint in the time periods provided in this section, the matter shall be considered a default, pursuant to section 60040.41 and the respondent shall be considered to have waived his or her right to appear in the matter covered by the complaint.

(e) A respondent may:

(1) As a matter of right amend the response within 30 days following the complainant's amendment of the complaint pursuant to section 60040.17; or

(2) Upon stipulation with the complainant or by permission of the hearing officer, upon a finding of good cause shown by respondent, and upon a finding that such amendment would not prejudice the complainant, may amend the response up until 10 days prior to the date set for the first proceeding on the merits of the complaint.

Note: Authority cited: Sections 39600 and 39601, 43028, Health and Safety Code.

Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§ 60040.19. Issues for Hearing.

The issues for hearing shall be limited to those raised in the complaint or amended complaint and the response or amended response.

Note: Authority cited: Sections 39600 and 39601, 43028, Health and Safety Code.
Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

Subarticle 5. Filing and Initial Review of Petitions for Review and Executive Officer's Response

§ 60040.20. Filing of Petitions for Review Hearing.

(a) Within 30 days after receipt of a decision by the executive officer described in section 60040.1, a person directly affected by the decision may file a petition requesting a hearing to review the decision. The hearing officer may extend the time for filing for good cause.

(b) A petition shall be filed with the clerk of the board, at the offices of the state board in Sacramento with a copy served on the executive officer, and the hearing office in Sacramento and shall include the following information:

- (1) The name and address of the petitioner;
- (2) A copy of the executive officer decision for which review is requested;
- (3) The date the decision was received by the petitioner;
- (4) The action that petitioner is requesting to be taken;
- (5) A complete, verified statement of the facts and relevant evidence; and
- (6) The grounds on which review is requested, including legal argument and authorities. The verification may be on information and belief.

Note: Authority cited: Section 39600 and 39601, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, Health and Safety Code.

§ 60040.21. Appointment of a Hearing Officer; Initial Review of Petition.

(a) The hearing office shall assign each petition that is filed to a hearing officer for initial review. Within 20 days of receipt of a petition for review, a hearing officer shall review the petition and determine whether a hearing is required by law. Pursuant to section 60040.1(b), all petitions seeking review of vehicle or engine recalls under Health and Safety Code section 43105 or intentions to revoke or suspend a license as a vehicle emission test laboratory under

Title 13, CCR, section 2048, shall have the right to a hearing. If the hearing officer determines that a hearing is not required, the petitioner shall be notified of the decision and there shall be no hearing under this article.

(b) The decision of the hearing officer is subject to reconsideration by the state board, itself under subarticle 10.

(c) The hearing office shall make arrangements to send a copy of the petition and any decision of the hearing officer or the state board to any person who was given written notice of the executive officer's decision.

Note: Authority cited: Section 39600 and 39601, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, Health and Safety Code.

§ 60040.22. Stays Pending Hearing.

(a) On timely receipt of a petition requesting a hearing:

(1) A decision of the executive officer ordering a recall of vehicles or engines or stating an intention to suspend or revoke the license of a vehicle emission test laboratory shall be stayed until a final decision has been issued pursuant to section 60040.47.

(b) Other decisions of the executive officer may be stayed pending review until a final decision has been issued pursuant to section 60040.47 unless the hearing officer finds that the adverse effects of a stay on the public health, safety and welfare outweigh the harm to those persons directly affected by the lack of a stay. The hearing officer may conduct a hearing or request such submissions by the parties as necessary to obtain information to make a determination on this issue.

Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, Health and Safety Code.

§ 60040.23. Executive Officer Response to Petition.

Within 10 days after issuance of the hearing officer determination that a hearing is required, the executive officer shall file with the hearing office and serve upon the petitioner a response to the petition. The response shall contain the reasons for and the facts in support of the decision of the executive officer under review.

Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, Health and Safety Code.

Subarticle 6. Prehearing Procedures

§ 60040.24. Scheduling of Hearing.

(a) Upon receipt of a response, the hearing office shall within 30 days of the issuance of the complaint or receipt of a petition for review assign the matter to a hearing officer and schedule all hearings. A hearing on the merits of the complaint shall be scheduled to be heard no later than 180 days from the date of issuance of the complaint or from receipt of the petition for review, unless the hearing officer determines, for good cause, that a later hearing date is necessary and in the interest of justice.

(b) The hearing office shall deliver or mail a notice of hearing to all parties at least 30 days prior to the hearing. The notice shall be in the form specified in section 11509 of the Government Code, and shall also provide notice of the availability of interpreters pursuant to section 60040.10 of these rules.

(c) The hearing officer shall grant such delays or continuances as may be necessary or desirable in the interest of fairly resolving the case.

(1) The hearing officer may, on his or her own motion or upon request of any party accompanied by a showing of good cause, continue a hearing to another time or place.

(2) A party shall apply to the hearing officer for a continuance not less than 5 days prior to the scheduled hearing.

(3) When a continuance is ordered during a hearing, the hearing officer shall give written notice of the time and place of the continued hearing.

(d) The hearing office shall set the place of hearing at a location as near as practicable to the place where the owner resides or maintains a place of business in California. If the owner does not reside or maintain a place of business in California, the hearing shall be in Sacramento. The hearing office may establish hearing locations anywhere in the state; at a minimum one hearing location shall be established in Sacramento and one in the Los Angeles area.

(e) Upon the motion of any party and a showing of good cause, or upon the motion of the hearing officer, and in the absence of an objection from any party, the hearing officer may exercise discretion to conduct all or part of a hearing by telephone or other electronic means.

(1) In granting such a motion, the hearing officer must be assured that each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe all exhibits fully.

(2) The hearing officer may direct the party who has requested the alternative method to make the necessary arrangements and be responsible for any associated costs.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Sections 11509 and 11440.30, Government Code.

§ 60040.25. Motion to Intervene.

(a) A person may file a motion to intervene, and the hearing officer may grant such a motion if all of the following conditions are satisfied:

(1) The motion is in writing, with copies served on all parties named in the complaint or the petition for review.

(2) The motion is made as early as practicable prior to the prehearing conference, if

one is held, or the first day of the hearing on the merits of the complaint or petition for review.

(3) The motion states facts demonstrating that the requesting intervenor's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding or that it qualifies as an intervenor under a statute or regulation.

(4) The hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention.

(b) If motion is granted, the hearing officer may impose conditions on the intervenor's participation in the proceeding, either at the time that intervention is granted or at a later time. Conditions may include:

(1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion.

(2) Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceeding.

(3) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceeding.

(4) Limiting or excluding the intervenors's participation in settlement negotiations.

(c) The hearing officer shall issue an order granting or denying the motion for intervention as soon as practicable in advance of the hearing, briefly stating the reasons for the order and specifying any conditions that he or she has determined as appropriate. The hearing officer may modify the order at any time, stating the reasons for the modification. The hearing officer shall promptly give notice of any order granting, denying, or modifying intervention to the applicant and to all parties.

(d) Whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by allowing intervention is a determination to be made in the sole discretion, and based on the knowledge and judgment at that time of the hearing officer. The determination is not subject to administrative or judicial review.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code. Section 11440.50, Government Code.

60040.26. Consolidation.

(a) The hearing officer may consolidate for hearing and decision any number of proceedings involving the same respondent or petitioner.

(b) Upon motion of a party or upon the hearing officer's own motion, the hearing officer may consolidate for hearing and decision any number of proceedings involving common issues of law or fact where consolidation would expedite and simplify consideration of the issues and would not adversely affect the rights of the parties.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§60040.27. Prehearing Conference.

(a) In any action in which the respondent timely responds pursuant to section 60040.18, or a petition for review has been scheduled for hearing, the hearing officer may require a prehearing conference upon his or her own order or the request of any party. A request for a prehearing conference shall be in writing, addressed to the hearing officer and served on all parties.

(b) A prehearing conference shall be held no later than 30 days after an order of the hearing officer or a request by a party, but no later than 90 days from the date of respondent's filing of the response or receipt of the petition for review.

(c) The hearing officer may conduct the conference in person or by telephone.

(d) At least 10 business days before a scheduled conference, each party shall file with the hearing office and serve on all other parties a prehearing conference statement which shall contain the following information:

(1) Identification of all operative pleadings by title and date signed;

(2) The party's current estimate of time necessary to try the case;

(3) The name of each witness the party may call at hearing along with a brief statement of the content of the witness's expected testimony;

(4) The identity of any witness whose testimony will be presented by affidavit pursuant to section 60040.29, if known;

(5) The name and address of each expert witness the party intends to call at hearing along with a brief statement of the opinion the expert is expected to give. The party shall also attach a copy of a current resume for each expert witness;

(6) Whether there is need for an interpreter or special accommodation at the hearing;

(7) A list of the documentary exhibits the party intends to present at hearing and a description of any physical or demonstrative evidence; and

(8) A concise statement of any legal issues which may affect the presentation of evidence or the disposition of the case.

(e) At the prehearing conference the hearing officer may:

(1) Establish a time and place for further proceedings in the action, but no hearing on the merits of the action shall take place sooner than 30 days following the date of the prehearing conference;

(2) Attempt to simplify issues and help the parties to stipulate to facts not in dispute;

(3) Explore the necessity or desirability of amendments to the pleadings; and

(4) Discuss any other appropriate subject.

(f) After the prehearing conference, the hearing officer shall issue a prehearing order which incorporates the matters determined at the conference. This order may be issued orally if an accurate record can be made. Agreement on the simplification of issues, amendments, stipulations, or other matters may be entered on the record or may be made the subject of a written order by the hearing officer. If no matters were determined or dates set at the prehearing conference, a prehearing order is not required. The hearing officer may, to aid the efficient administration of justice, modify the prehearing order as necessary.

Note: Authority cited: Sections 39600 and 39601, 43028, Health and Safety Code.

Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§60040.28. Settlement Agreements and Consent Orders.

(a) At any time before a final decision of the hearing officer, the complainant and the respondent may settle an action, in whole or in part, by agreeing upon a civil penalty, with or without conditions.

(b) The parties may request the assistance of the hearing office in their attempts to settle the matters at issue. Upon receiving such a request, the hearing office may assign a settlement hearing officer, who is not the same hearing officer that has been assigned, to hear the merits of the case, unless the parties specifically request in writing the assignment of the latter hearing officer.

(c) The parties shall memorialize any agreement in writing.

(d) In a complaint proceeding, the hearing officer assigned to hear the merits of the case, shall thereafter enter a consent order in accordance with the terms of the settlement agreement. Such consent order is not subject to further review by the agency or a court.

(e) In a petition for review proceeding, if the parties resolve all issues raised by the petition, the petitioner shall agree to withdraw the petition and the case shall be dismissed.

(f) If the filing of the consent order pursuant to paragraph (d) of this section or the settlement in the petition for review proceeding does not wholly conclude the action, the hearing officer assigned to hear the merits of the case shall promptly inform the parties of the schedule of the remaining proceedings. Settlement discussions or offers of compromise regarding unresolved issues shall not be discussed with the hearing officer assigned to hear the merits of the case or made part of the record of the proceedings.

Note: Authority cited: Sections 39600 and 39601, 43028, Health and Safety Code.
Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; section 11415.60, Government Code.

§ 60040.29. Discovery.

(a) The provisions of this section provide the exclusive right to and method of discovery as to any proceeding governed by these hearing procedures.

(b) Names and Address of Witnesses and Access to Documents.

(1) After initiation of a proceeding involving a complaint or a petition for review in which a respondent or petitioner is entitled to a hearing on the merits, a party may request, within 45 days of issuance of a complaint or amended complaint or filing of a petition for review:

(A) The names and addresses of witnesses to the extent known to the other party, including but not limited to, those intended to be called to testify at the hearing;

(B) A copy of any document, thing, statement or other writings relevant to the issues for hearing which is in the control of the other party and relevant to the issues of the proceedings, and would be admissible in evidence. This includes the following information from inspection or investigative reports prepared by, or on behalf of, any party that pertain to the subject matter of the proceeding: (i) the names and addresses of witnesses or of persons (other than confidential informants) having personal knowledge of the issues involved in the proceeding, (ii) matters perceived by the investigator in the course of his or her investigation

(as opposed to his or her analysis or conclusions), and (iii) statements from related to the issues of the proceedings which are otherwise admissible. Nothing in this section authorizes the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

(2) Parties shall arrange a mutually convenient time for inspecting and copying the writings or other statements, but such date shall not be later than 30 days prior to the date set for the hearing on the merits. If no such date can be agreed upon, the party receiving a request shall make its documents available for copying and inspection no later than 30 days from the date of service of the request. Unless other arrangements are made, the party requesting the writings shall pay for the copying.

(3) A party claiming that certain writings or things are privileged against disclosure shall serve on the requesting party a written statement setting forth what matters it claims are privileged and the reasons supporting its claims.

(c) Depositions.

(1) Unless otherwise stipulated to by the parties, depositions shall be limited to the following:

(A) A party may petition the hearing office to request that it be allowed to take the testimony of a material witness who is either unable to attend or cannot be compelled to attend a hearing on the merits may be obtained by deposition in the manner prescribed by law for depositions in civil actions;

(B) The petition shall set forth the nature of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of the testimony; a showing that the witness will be unable or cannot be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose;

(C) The petitioner shall serve notice of the deposition and a copy of the petition on the other parties at least 10 days before the date set for the deposition.

(2) Where the witness resides outside of the state and where the hearing officer has ordered the taking of the testimony by deposition, the hearing officer shall obtain an order of court to that effect by filing a petition in the superior court in Sacramento County. The proceedings for such a hearing shall be in accordance with the provisions of Government Code section 11189.

(d) Proceeding to Compel Discovery.

(1) Any party claiming its request for discovery pursuant to this section has not been complied with may serve and file with the hearing officer a motion to compel the party who has refused or failed to produce the requested discovery to comply. The motion shall include the following:

(A) Facts showing the party has failed or refused to comply with a discovery request;

(B) A description of the information sought to be discovered;

(C) The reasons why the requested information is discoverable;

(D) Evidence that a reasonable and good faith attempt to contact the noncomplying party for an informal resolution of the issue has been made; and

(E) To the extent known by the moving party, the measures for the noncomplying party's refusal to provide the requested information.

(2) The motion shall be filed within 15 days after the date the requested information was to be made available for inspection and copying or the date a deposition was scheduled to take place and served upon the party who has failed or refused to provide discovery.

(3) The hearing on the motion to compel discovery shall be held within 15 days after the motion is filed, or a later time that the hearing officer may on his or her own motion for good cause determine. The party who has refused or failed to provide discovery shall have the right to serve and file a written answer or other response which shall be due at the hearing office and personally served on all parties at least three days prior to the date set for hearing.

(4) Where the matter sought to be discovered is under the custody or control of the party who has refused or failed to provide discovery and that party asserts that the matter is not a discoverable matter under this section, or is privileged against disclosure, the hearing officer may order that the party in custody lodge with the hearing office the matters identified in subdivision (b) of section 915 of the Evidence Code and the hearing officer shall examine the matters in accordance with those provisions.

(5) The hearing officer shall decide the case on the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the hearing officer may allow.

(6) Unless otherwise stipulated by the parties, the hearing officer shall no later than 15 days after the hearing make its order denying or granting the motion. The order shall be in writing setting forth the matters the moving party is entitled to discover. The hearing office shall serve a copy of the order by mail upon the parties. Where the order grants the motion in

whole, or in part, the order shall not become effective until 10 days after the date the order is served. Where the order denies relief to the moving party, the order shall be effective on the date it is served.

(7) If after receipt of an order directing compliance with the provisions of these rules regarding discovery, a party fails, without good cause, to comply with the order, the hearing officer may draw adverse inferences against that party and may prevent that party from introducing any evidence that had been requested and not produced during discovery into the administrative record.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Sections 11189, 11507.6, Government Code; section 915(b), Evidence Code.

§60040.30. Subpoena and Subpoena Duces Tecum.

(a) Subpoenas and subpoenas duces tecum shall be issued by the hearing officer assigned to a proceeding, general counsel, or executive officer at the request of a party or, if represented by an attorney, the attorney of record for a party in accordance with sections 1985 - 1985.4 of the California Code of Civil Procedure.

(b) The custodian of documents that are the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit in compliance with section 1561 of the Evidence Code.

(c) The process extends to all parts of the state and shall be served in accordance with sections 1987 and 1988 of the California Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear at the time and place required for the appearance or testimony pursuant to a subpoena, shall prove that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.

(d) No witness is obliged to attend unless the witness is a resident of the state at the time of service.

(e) Upon timely motion of a party or witness, or upon his or her own motion, after notice to the parties and an opportunity to be heard and upon a showing of good cause, the hearing officer may order the quashing of a subpoena or subpoena duces tecum entirely, may modify it, or may direct compliance with it upon other terms or conditions. In addition, the hearing officer may make any other order as may be appropriate to protect a party or witness from unreasonable or oppressive demands.

(f) The state board may quash a subpoena or a subpoena duces tecum that it has issued on its own motion.

(g)(1) In the case of the production of a party to the record of a proceeding or of a person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena on the witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the attorney of the party or person.

(2) Service of written notice to attend under this section shall be made in the manner and is subject to the conditions provided in section 1987 of the California Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.

(h) A witness other than an employee of the state or a political subdivision thereof appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive the same mileage, and appearance fees allowed by law; such fees are to be paid by the party at whose request the witness is subpoenaed.

(i)(1) In the case of the production of a party to the record of a proceeding or of a person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena on the witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the attorney of the party or person.

(2) Service of written notice to attend under this section shall be made in the manner and is subject to the conditions provided in section 1987 of the California Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43150, 43028, Health and Safety Code; Sections 11186 -11188, 11450.05 - 11450.30, Government Code; Section 1561, Evidence Code, sections 1985 - 1985.4, 1987, 1988, California Code of Civil Procedure.

§ 60040.31. Witness Lists.

(a) No later than 10 days before the scheduled hearing date, the parties shall submit to the hearing office and serve upon the other parties, a list of the names, addresses and qualifications of proposed witnesses and a brief summary of the testimony to be presented by each witness.

(b) The hearing officer may prohibit any party from presenting any witness that has not been included on that party's witness list as required under paragraph (a) of this section.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§ 60040.32. Motions for Summary Determination of Issues.

(a) Any party may file a motion for summary judgment or summary adjudication of the issues. Such motions shall include supporting legal argument, and where necessary, affidavits showing that there is no genuine issue of material fact for determination regarding the identified issues. A party opposing such a motion shall show by affidavit or other documentation that a genuine issue of material fact as to the issues raised exists. After reviewing the motion and response of the parties, the administrative record, and any arguments of the parties, the hearing officer shall determine whether a genuine issue of material fact as to the issues exists and whether a party is entitled to judgment as to liability as a matter of law.

(b) If, upon considering a motion under subparagraph (c), the hearing officer determines that a party is entitled to summary judgment as to liability as a matter of law, the hearing officer shall issue a written decision or order that sets forth necessary findings of fact and conclusions of law regarding all matters that were at issue. If the decision finds liability, the hearing officer shall follow the penalty assessment criteria set forth in section 60075.40.

(c) The hearing officer shall deny a request for summary determination of liability if he or she finds the administrative record, including any evidence presented by the parties as part of this motion, present a genuine issue of material fact. If the hearing officer denies a request for summary determination, or denies such a request in part, the hearing officer shall promptly issue to each party a written ruling as to the existence of a genuine issue of material fact as to liability and the reasons for the ruling. The matter shall continue to be set for hearing on all issues for which a genuine issue of material fact exists.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

Subarticle 7. Contempt and Sanctions

§ 60040.33. Contempt.

If any person in proceedings before the hearing officer disobeys or resists any lawful order or refuses to respond to a subpoena, subpoena duces tecum, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or in its immediate vicinity as to obstruct the proceedings, the hearing officer may certify the facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code section 11455.20.

Note: Authority cited: Sections 39600 and 39601, 43028, Health and Safety Code.

Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Sections 11455 and 11525, Government Code.

§ 60040.34. Sanctions.

(a) Notwithstanding the above, the hearing officer may order a party, a party's representative or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions; the failure to comply with a discovery request or subpoena; or the failure to comply with a lawful order of the hearing officer.

(2) "Frivolous" means:

(A) totally and completely without merit, or

(B) for the sole purpose of harassing an opposing party.

(b) An order for sanctions may be oral on the record or in writing and shall set forth the factual findings which are the basis for the imposition of sanctions.

(1) In determining reasonable expenses, the party or parties to whom payment is to be made shall, at the hearing officer's discretion, either make a statement on the record under oath or submit a written declaration under penalty of perjury setting forth with specificity the expenses incurred as a result of the other party's conduct.

(2) Within 5 days of the receipt of the hearing officer's order for the payment of expenses, a party or representative may, on the ground of hardship, request reconsideration from the hearing officer issuing the order. The request for reconsideration shall be filed in writing, and include a declaration under penalty of perjury.

(c) The order or denial of an order to pay expenses under paragraph (b) is subject of procedural review in the same manner as a final decision pursuant to subarticle 11.

Note: Authority cited: Sections 39600 and 39601, 43028, Health and Safety Code.
Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Sections 11455.30 and 11525, Government Code.

Subarticle 8. Hearings

§ 60040.35. Failure to Appear.

If after service of a notice of hearing, including notice of consolidated hearing or continuance, a party fails to appear at a hearing either in person or by representative, the hearing officer may take the proceeding off calendar, or may, at the request of a party, or on his or her own motion, issue a default order in a complaint proceeding in accordance with section 60040.41 of this article, or adversely rule against the absent party in a petition for review hearing.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§ 60040.36. Conduct of Hearing.

(a) The hearing shall be presided over by a hearing officer who shall conduct a fair and impartial hearing in which each party has a reasonable opportunity to be heard and to present evidence.

(b) The hearing shall be conducted in the English language.

(c) Each party to the proceeding shall have these rights:

(1) To call and examine witnesses;

(2) To introduce exhibits;

(3) To question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examinations; and

(4) To impeach any witness regardless of which party first called the witness to testify. If a party does not testify on his or her behalf, the party may be called and examined as if under cross-examination.

(d) In a complaint proceeding:

(1) The complainant shall present evidence supporting issuance of the complaint, and any other material that is pertinent to the issues to be determined by the hearing officer.

(2) The respondent has the right to examine, respond to, or rebut the allegations of the complaint and any proffered evidence and material. The respondent may offer any documents, testimony, or other exculpatory evidence which bears on appropriate issues, or may be relevant to the penalty amount.

(3) At the close of respondent's presentation of evidence, the hearing officer may allow the introduction of rebuttal evidence by the complainant. The hearing officer may

allow the respondent to respond to any such evidence submitted by complainant.

(e) In a petition for review hearing:

(1) The petitioner has the initial burden of showing that the executive officer acted without or in excess of his or her authority in issuing the decision under review; or that the decision is not supported by facts or applicable law. The petitioner shall present documentation, testimony, or other evidence to support all claims made that are pertinent to the issues presented to the hearing officer for determination.

(2) The executive officer has the right to examine, respond to, or rebut any contentions raised by petitioner, and may offer any documents, testimony, or other evidence which bears on relevant issues.

(3) At the close of the executive officer's presentation of evidence, the hearing officer may allow the parties to present rebuttal evidence.

(f) The hearing officer may limit:

(1) The number of witnesses and the scope and extent of any direct examination, cross-examination, or rebuttal testimony as necessary to protect the interests of justice and conduct a reasonably expeditious hearing;

(2) Require the authentication of any written exhibit or statement; and

(3) Call and examine a party or witness and may, on his or her own motion, admit any relevant and material evidence.

(g) The taking of evidence in a hearing shall be controlled by the hearing officer in the manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the hearing officer shall define the issues and the order in which evidence will be received.

(h) Hearings shall be recorded electronically.

(1) A verbatim transcript will not normally be prepared, but may be ordered by the hearing officer if deemed necessary to permit a full and fair review and resolution of the case. If not so ordered by the hearing officer, a party may, at its own expense, request that a verbatim transcript be made. The party making the request shall provide one copy to the hearing officer and one copy to every other party.

(2) The transcript or recording of the hearing, together with all written submissions made by the parties, shall become part of the administrative record for the proceeding.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Section 43028, Health and Safety Code.

§ 60040.37. Evidence.

(a) Testimony shall be taken only under oath or affirmation.

(b) The hearing need not be conducted according to technical rules relating to evidence and witnesses. The hearing officer shall admit evidence which is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions, and which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The application of these rules shall not affect the substantial rights of the parties as provided in the Evidence Code.

(c) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

(d) Trade secret and other confidential information may be introduced into evidence. The hearing officer shall preserve the confidentiality of such information, and may make such orders as may be necessary to consider such evidence in camera, including the use of a supplemental order or decision to address matters which arise out of that portion of the evidence which is confidential.

(e) In reaching a decision, official notice may be taken, either before or after submission of the proceeding for decision, of any generally accepted technical or scientific matter within the state board's area of expertise, and determinations, rulings, orders, findings and decisions, required by law to be made by the state board or the hearing officer.

(1) The hearing officer shall take official notice of those matters set forth in section 451 of the Evidence Code.

(2) The hearing officer may take official notice of those matters set forth in section 452 of the Evidence Code.

(3) Each party shall give notice of a request to take official notice and be given reasonable opportunity on request to present information relevant to:

(A) the propriety of taking official notice; and

(B) the effect of the matter to be noticed.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Sections 451, 452, Evidence Code.

§ 60040.38. Evidence by Affidavit or Declaration.

(a) At any time 10 or more days prior to a hearing or a continued hearing, a party may mail or deliver to the opposing party or parties a copy of any affidavit or declaration which the proponent proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless an opposing party, within 7 days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine the affiant or declarant the opposing party's right to cross-examine such affiant or declarant is waived and the affidavit or declaration, if introduced in evidence, shall be given the same effect as if the affiant or declarant had testified orally. If an opportunity to cross-examine an affiant or declarant is not afforded after request therefore is made as herein provided, the hearing officer may allow the affidavit or declaration to be introduced but if it is allowed to be introduced, it shall only be given the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall be in the following form:

"The accompanying affidavit or declaration of [insert name of affiant or declarant] will be introduced as evidence at the hearing in [insert title and docket number or petition number of proceeding]. [Insert name] will not be called to testify orally and you will not be entitled to question the affiant or declarant unless you notify [insert name of the proponent, representative, agent or attorney] at [insert address] that you wish to cross-examine the affiant or declarant. To be effective, your request must be mailed or delivered to [insert name of proponent, representative, agent or attorney] on or before [insert a date 7 days after the date of mailing or delivery of the affidavit to the opposing party]."

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§ 60040.39. Exclusion of Witnesses.

Upon motion of a party, the hearing officer may exclude from the hearing room any witnesses not at the time under examination; but the parties or their representatives to the proceeding shall not be excluded.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§ 60040.40. Oral Argument and Briefs.

(a) Prior to the close of the hearing, the hearing officer may, on his or her own motion, or upon motion of a party, grant and determine the length of oral argument.

(b) Motions to submit written argument shall be made prior to the close of the hearing and shall be granted at the discretion of the hearing officer upon a determination that written argument will be productive and will not unreasonably delay the disposition of the proceeding. A party shall file written argument within 15 working days from the date of the hearing. Opposing parties may file an answer within 10 working days from service of the argument. The hearing officer may extend or reduce the above filing dates for submission of written argument for good cause.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

Subarticle 9. Decisions of the Hearing Officer

§60040.41. Default Order.

(a) A respondent in a complaint proceeding shall be in default if it fails to file a response as required under section 60040.18.

(b) A party, including the state board, may be found to be in default upon failure to appear at hearing without good cause.

(1) In a matter involving a complaint, no finding of default shall be made against the respondent unless the complainant presents sufficient evidence to establish a prima facie showing that the state board and the hearing officer had jurisdiction over the matters at issue and that the complaint was properly served. Upon entry of default against the respondent, respondent shall be held to have violated all statutes, rules and regulations alleged in the complaint.

(2) In a petition for review hearing, an entry of default by the petitioner shall result in dismissal of the petition, with prejudice.

(3) In a hearing on a complaint or a petition for review, a default by the complainant shall respectively result in either dismissal of the complaint with prejudice, or reversal of the decision of the executive officer that is under review.

(c) If a default against a respondent in a complaint proceeding occurs, the state board, within 10 days, shall present written evidence, supported by affidavits or declarations explaining the proposed penalty set forth in the complaint.

(d) If the hearing officer determines that a default has occurred, he or she shall issue a default order against the defaulting party. This order shall constitute a order or decision after hearing for purposes of section 60040.42 of these rules.

(e) Any proceeding may be reinstated by the hearing officer upon a showing of good cause that contains sufficient facts to show or establish a reasonable basis for the failure to appear at the hearing. The request for reinstatement shall be made by the defaulting party within 30 days of service of the default order pursuant to section 60040.39(d) of these rules.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§60040.42. Order or Decision of the Hearing Officer after a Complaint Hearing; Rehearing.

(a) Unless otherwise ordered, all complaint proceedings shall be submitted at the close of the hearing unless otherwise extended by the hearing officer or provided in these rules. Within a reasonable period of time after the proceeding is submitted, the hearing officer shall summarize the evidence received and relied upon, make findings upon all facts relevant to the issues for hearing, and file an order or decision with the reasons or grounds upon which the order or decision was made.

(b) The order or decision shall be in writing, signed and dated by the hearing officer deciding the proceeding.

(c) The order or decision may, based on the findings of fact, affirm, modify or vacate the alleged violations set forth in the complaint or the proposed penalty, or direct other relief as applicable.

(d) A copy of the order or decision shall be served on each party or representative together with a statement informing the parties of their right to petition the executive officer, for reconsideration of the order or decision pursuant to section 60040.44 of these rules.

(e) (1) Within 5 days of the filing of any order or decision, the hearing officer may, at the request of any party or on his or her own motion, on the basis of mistake of law or fact, issue a modified order or decision correcting a mistake or error with respect to any matters determined or covered by the previously issued order or decision. If necessary, the hearing officer may schedule further proceedings to address the issue(s).

(2) If a request has been filed under this subparagraph, the request shall be deemed denied if the hearing officer has taken no action to address the request within 15 days of filing of the request.

(3) The hearing office shall serve a copy of any modified order or decision on each party that had previously been served with the original order or decision.

(f) The hearing officer shall certify the administrative record and shall make available copies of the administrative record and any issued orders or decisions to the executive officer.

(g) The order or decision or modified order or decision of the hearing officer shall become effective 20 days after it has been served on the respondent, unless the executive officer, on his or her own motion, issues an order of reconsideration or grants a further stay, or a request for reconsideration has been filed by a party pursuant to 60040.44. If a request for reconsideration has been filed, the effective date of the decision shall automatically be stayed for at least 20 additional days from the date of filing of the request for reconsideration.

§ 60040.43. Proposed Order or Decision of the Hearing Officer after Petition for Review Hearing; Order or Decision of the Board.

(a) Unless otherwise ordered, all hearings on petitions for review shall be submitted at the close of the hearing unless otherwise extended by the hearing officer or provided in these rules. Within a reasonable period of time after the proceeding is submitted, the hearing officer shall summarize the evidence received and relied upon, make findings upon all facts relevant to the issues for hearing, and file a proposed order or decision with the reasons or grounds upon which the order or decision was made.

(b) The proposed order or decision shall be in writing, signed and dated by the hearing officer deciding the proceeding.

(c) The hearing officer shall immediately certify the administrative record and forward it, together with a copy of the proposed order or decision, to the clerk of the board. Within thirty days after receipt of the proposed order or decision, the clerk of the board shall serve a copy of the proposed order or decision on each party to the proceeding or its representative and shall issue a public notice that the Board will conduct a public hearing to consider adoption of the proposed order or decision. At the public hearing, the Board may take any of the following actions:

(1) Adopt the proposed order or decision in its entirety.

(2) Make technical or other minor changes to the proposed order or decision and adopt it as its own. Actions under this subparagraph are limited to clarifying or other changes that do not affect the factual or legal basis of the proposed decision.

(3) Refer the matter back to the hearing officer for the taking of additional evidence, or order that additional evidence be taken at a hearing before the Board itself. If the matter is remanded to the hearing officer, the hearing officer shall issue and serve upon the parties a

new proposed order or decision based upon the new evidence that has been received. In such an event, the Board shall consider the newly proposed order or decision under the procedures set forth in this section.

(4) Issue its own written order or decision, based on the administrative record and any additional evidence presented during the public hearing, setting forth findings of fact and conclusions of law regarding all issues necessary to support the order or decision.

(d) The clerk of the board shall serve a copy of the the decision or order of the Board on the petitioner, other parties to the proceedings, and any member of the public who has requested a copy. The Board shall specify in the order or decision the date that order or decision becomes effective.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

Subarticle 10. Reconsideration

§ 60040.44. Reconsideration by Executive Officer in Complaint Proceedings.

(a) A party aggrieved by an order or decision of a hearing officer in a complaint proceeding pursuant to section 60040.42 of these rules may, within 20 days of service of such order or decision, request that the executive officer reconsider the hearing officer decision with respect to any matters covered by the order or decision. The request for reconsideration shall be filed with the executive officer and shall be served on all parties and the hearing office. The request shall be deemed filed the date it is delivered or mailed to the executive officer.

(b) Within 20 days of issuance of an order or decision by a hearing officer in a complaint proceeding pursuant to section 60040.42 of these rules, the executive officer may, on his or her own motion, decide to order reconsideration of the order or decision of the hearing officer. The executive officer shall notify the parties and the hearing office of this decision.

Note: Authority cited: Sections 39600 and 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§ 60040.45. Reconsideration by the State Board After Issuance of Orders or Decisions in Petition for Review Hearings.

A party aggrieved by an order or decision of the state board, itself, relating to a petition for review of an executive officer decision pursuant to section 60040.43 of these rules, or an

initial determination by the hearing officer that a hearing to consider a petition is not required by law, pursuant to section 60040.21 of these rules, may within 20 days of service of such order or decision, request that the state board, itself, reconsider its order or decision with respect to any matters covered therein. The request for reconsideration shall be filed with the clerk of the board and shall be served on all parties and the hearing office. The request shall be deemed filed the date it is delivered or mailed to the clerk of the board.

§60040.46. Request for Reconsideration; Requirements; Comments Opposing Request.

(a) A request for reconsideration of a hearing officer order or decision regarding a complaint or the state board's order or decision regarding a petition for review of an executive officer decision shall be signed by the party or its representative and verified under oath. The request shall be based upon one or more of the following grounds:

- (1) The hearing officer or the state board acted without or in excess of its powers;
- (2) The order or decision was procured by fraud;
- (3) The order or decision is not supported by the evidence or the findings of fact;
- (4) The requesting party has discovered new material evidence that could not, with reasonable diligence, have been discovered and produced at the hearing; or
- (5) The hearing officer and/or the state board have misapplied applicable law.

(b) Any request for reconsideration shall specifically detail the grounds upon which the requesting party considers the order or decision to be unjust or unlawful and every issue to be considered on reconsideration. The requesting party shall be deemed to have fully waived all objections, irregularities, and illegalities concerning the proceeding upon which reconsideration is sought other than those specifically set forth in the request for reconsideration. The request for reconsideration will be denied if it contains no more than allegations of the statutory grounds for reconsideration, unsupported by specific references to the record and principles of law involved.

(c) When a request for reconsideration or answer thereto has been timely filed, the filing of supplemental papers or answers may be granted at the discretion of the executive officer, or the state board as applicable. Parties requesting a copy of the hearing record shall bear the cost of reproduction.

(d) The request for reconsideration may include a request that the order or decision of the hearing officer be stayed pending resolution of the request for reconsideration. As stated in section 60040.47, the order or decision shall be automatically stayed for 20 days from the date of filing of the request for reconsideration.

(e) Within 10 days of being served with notice of a request for reconsideration, a party opposed to the request may file an opposition to the request with the executive officer or the state board secretary, as applicable. The opposition shall be signed and verified under oath by the party or its representative and shall not exceed 6 pages.

Note: Authority cited: Sections 39600 and 39601, 43028, Health and Safety Code.
Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§60040.47. Decision on Reconsideration; Stays; Summary Denial.

(a) The executive officer or the state board, itself, as applicable, under these rules, may upon request, or on the executive officer's, or state board's own motion, respectfully stay, suspend, or postpone the order or decision of the hearing officer in a complaint proceeding or of the state board, in a petition for review proceeding while the request for reconsideration is pending.

(b) The executive officer or the state board, as applicable, shall be deemed to have summarily denied the request for reconsideration if the executive officer or state board has failed to act upon the request for reconsideration within 20 days from the date of filing of the request. The executive officer or the state board, as applicable, may, for good cause, extend the time within which the petition for reconsideration must be acted upon for a period not exceeding 10 days. The executive officer or the state board shall issue an order notifying the parties of the decision to summarily deny the request for reconsideration

(c) Upon summary denial:

(1) In a complaint proceeding, the order or decision of the hearing officer filed pursuant to section 60041.40 of these rules shall become final.

(2) In a petition for review proceeding, the order or decision of the state board, shall become final.

(d) If the request for reconsideration has not been summarily denied pursuant to subparagraph (b) above, the executive officer or the state board, itself, as applicable, may within 45 days after receipt of the request for reconsideration,

(1) Review some, but not all issues raised by the request;

(2) Delegate its review authority to one or more persons, subject or not subject to, further review by the executive officer or the state board, itself;

(3) Affirm, rescind, or amend the findings and conclusions of law, order or decision

of the hearing officer; or

(4) Direct the taking of additional evidence either by submission or further hearing.

(A) If the executive officer or the state board, itself, as applicable, order the parties to submit additional evidence, notice and an opportunity to respond shall be given to all parties.

(B) If the executive officer or the state board, itself, as applicable, order that additional evidence be taken at a further hearing conducted by the executive officer, state board, or the hearing officer and that additional findings of fact be made, notice of the time and place of further hearing shall be given to all parties and to such other persons that may be affected by the order.

(C) The issues on further hearing shall be limited to those set forth in the order issued under this section.

(D) The time limit in section 60040.40 of these rules for filing an order or decision shall not apply to further hearings during reconsideration.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Section 1140.10, Government Code.

Subarticle 11. Final Order or Decision; Judicial Review

§ 60040.48. Final Order or Decision; Effective Date

(a) Complaint Proceedings.

(1) If no request for reconsideration of a hearing officer's order or decision is filed within 20 days of the service of an order or decision, and no reconsideration has been ordered by the executive officer or the state board, on his or her own motion, the order or decision of the hearing officer shall become final. The effective date of the final order or decision shall be 20 days from the date of service of the hearing officer order or decision on the parties.

(2) If a request for reconsideration has been filed but has been summarily denied because the executive officer has not taken any action on the request within 20 days after receipt of the request, the underlying hearing officer order or decision shall become final. The effective date of the decision or order becoming final is the date that the order summarily denying the request for reconsideration is served on the parties.

(3) If a request for reconsideration has not been summarily denied, the order or

decision of the executive officer that addresses and fully disposes of the request for reconsideration is the final order or decision. The effective date of the order or decision is the date that the decision is served on the parties.

(b) Petition for Review Hearings

(1) If no request for reconsideration of state board's order or decision is filed within 20 days of the service of an order or decision, the initial order or decision of the state board shall become final. The effective date of the final order or decision shall be the date set forth in the state board's initial decision.

(2) If a request for reconsideration has been filed but summarily denied because the state board has not taken any action on the request within 20 days after receipt of the request, the initial order or decision of the state board shall become final. The effective date of the decision or order becoming final is the date that the order summarily denying the request for reconsideration is served on the parties.

(3) If reconsideration has not been summarily denied, the order or decision of the state board that addresses and fully disposes of the request for reconsideration is the final order or decision. The effective date of the order or decision is the date that the order or decision is served on the parties.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code.

§ 60040.49. Judicial Review.

(a) A party adversely affected by the a final decision of the hearing officer, or the executive officer and state board, upon reconsideration, may seek judicial review by filing a petition for a writ of mandate in accordance with section 1094.5 of the California Code of Civil Procedure. Such petition shall be filed within **30** days after the order or decision becomes final.

(b) The state board may seek to enforce a final order or decision in superior court in accordance with applicable law.

NOTE: Authority cited: Sections 39600, 39601, 43028, Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 43105, 43028, Health and Safety Code; Section 1094.5, California Code of Civil Procedure.